



DEVAL L. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LT. GOVERNOR

KEVIN M. BURKE
SECRETARY

The Commonwealth of Massachusetts
Executive Office of Public Safety
Fire Safety Commission

Automatic Sprinkler Appeals Board

P.O. Box 1025 ~ State Road

Stow, Massachusetts 01775

(978) 567-3181 Fax: (978) 567-3121

MAURICE M. PILETTE
CHAIRMAN

PAUL DONGA
VICE CHAIR

Docket # 2006-141
896 Hartford Turnpike
Shrewsbury, MA

AUTOMATIC SPRINKLER APPEALS BOARD
DECISION AND ORDER

A) Statutory and Regulatory Framework

This is an administrative proceeding held in accordance with Massachusetts General Laws Chapter 30A; Chapter 148, section 26G½ and Chapter 6, section 201, relative to a determination by the Shrewsbury Fire Department, requiring the installation of an adequate system of automatic sprinklers in a building owned by Richard J. Luzzo, agent of the Ripal Inc., d/b/a Williker's Tex-Mex BBQ (hereinafter referred to as the Appellant). The building, which is the subject of the Order, is located at 896 Hartford Turnpike, Shrewsbury, MA.

B) Procedural History

By written notice the Shrewsbury Fire Department issued an Order to the Appellant informing him about the provisions of a new law, M.G.L. c. 148, s.26G½, which requires the installation of an adequate system of automatic sprinklers in certain buildings or structures. The building subject to the order is located at 896 Hartford Turnpike, Shrewsbury, MA. The Board held a hearing relative to this appeal on March 13, 2007, at the Department of Fire Services, Stow, Massachusetts.

Appearing on behalf of the Appellant was Richard J. Luzzo, owner and agent for Ripal Inc. Appearing on behalf of the Shrewsbury Fire Department was Fire Chief Gerald LaFlamme and Shrewsbury Building official, Ronald S. Alarie.

Present for the Board were: John Mahan, Acting Chairman; City of Boston Fire Commissioner Roderick Fraser; Chief Thomas Coulombe, Alexander MacLeod, and George Duhamel. Peter A. Senopoulos, Esquire, was the Legal Counsel for the Board.

C) Issue(s) to be Decided

Whether the Board should affirm, reverse or modify the enforcement action of the Shrewsbury Fire

Department relative to the subject building in accordance with the provisions of M.G.L. c.148, s. 26G½?

D) Evidence Received

1. Application for Appeal filed by Appellant
2. Statement in Support of Appeal
3. Various Newspaper articles/menus advertising the facility
4. Letter in support of facility from Worcester District Court Clerk Magistrate
5. Initial Order of Shrewsbury Fire Department
6. Reminder Notice of the Shrewsbury Fire Department
7. Rejection of Appeal by the Automatic Sprinkler Appeals Board
8. Request for Reconsideration of Denial by Appellant
9. Letter in Support of Reconsideration Request from Rep. Karen Polito, 11th Worcester
10. Letter from Board to Owner of Facility
11. 2nd Request for Reconsideration of Denial by Appellant
12. Notice of Hearing on Motion to Reconsider Denial of Appeal to Appellant
13. Notice of Hearing on Motion to Reconsider Denial of Appeal to Shrewsbury Fire Dept.
14. Re-issue of Order of Notice of Shrewsbury Fire Department
15. Notices of Pre-Hearing Status Conference to Parties (two separate dates)
16. Notice of Hearing to Appellant
17. Notice of Hearing to Shrewsbury Fire Department
18. Appellant's Submissions (current occupancy certificate)
19. Floor plan (sketch)
20. Liquor License
21. Appellant's Photos (pages 1-13)
22. Shrewsbury Fire Department Submissions (pages 1-20)

E) Subsidiary Findings of Fact

- 1) On May 23, 2006, the Automatic Sprinkler Appeals Board originally rejected an Appeal filed by the Appellant on May 18, 2006, because the appeal was filed more than 45 days after the original Order of Notice was issued to the Appellant by the Shrewsbury Fire Department. On June 13, 2006, the Board received Appellant's request for Reconsideration of Denial of the Appeal. On September 13, 2006, the Board scheduled a Hearing on the Appellant's Motion to Reconsider Denial of Appeal at the Department of Fire Services, Stow, Massachusetts. It was at this time that Shrewsbury Fire Chief, Gerald LaFlamme, agreed to consider his most recent Order of Notice to the Appellant, dated May 9, 2006, as the date of formal and final notification of his determination. Based upon this May 9th date, the Board deemed that the matter was now timely. The Board held a hearing on March 13, 2007.
- 2) According to a new Certificate of Inspection issued on April 1, 2006 and amended on November 1, 2006, the Town of Shrewsbury Building Department indicated that the subject building and establishment has a maximum allowable occupancy load of 245 persons and is currently classified as a use group classification "A-3." Based upon said Certificate of Inspection, there are separate capacities listed for the following rooms: 55 for the Dining room, 50 for a bar area, 25 for an

outdoor patio, 70 for a lounge area and 45 for the pool room and game room. The separate occupancy capacity limits were recently established by the Town Building official at the request of the Appellant. Previous Certificates existed which indicate a total capacity of 170 persons listed in the following two areas: 80 persons in the dining room and game room and 90 persons in the lounge and bar areas. The older certificate included lower capacity limits since said certificate did not include additional areas that have been added on in past years. The plans also indicated that another room exists on a second floor. Appellant indicated that this space is an office area not occupied by the general public.

- 3) The Appellant contends that the establishment is principally a restaurant and is therefore exempt from the sprinkler provisions of M.G.L. c.148, s.26G½. He testified that the percentage of business revenue is approximately 61% food and the remaining portion (39%) is from the sale of alcohol. However, no accounting records were submitted to support this breakdown. He further stated that all advertisements for the facility focus on the food as the main attraction.
- 4) The establishment serves full meals on a daily basis from 11:30 a.m. until approximately one hour before closing time. The facility has a full service bar, which is also used as a service bar for customers seated at the tables. Full meals are available in the “bar” area in addition to the dining area. However, bar customers often purchase alcoholic beverages only without purchasing food items. The establishment has a separate bar area, pool table/game area and a dining area with an occupancy capacity as aforementioned. Appellant indicated that customers are allowed to freely travel from one room to another and that all rooms are open during all hours of operation.
- 5) The facility holds a license to serve “ All kinds of Alcoholic beverages to be drunk on the premises”. The license allows liquor to be sold: Monday through Saturdays from 8:00 a.m. to 2:00 a.m. and Sundays from 11:00 a.m. to 1:00 a.m. Appellant indicated that last call is at approximately 12:50 a.m.
- 6) The establishment has been issued an entertainment license that allows the establishment to feature live music. A copy of the license was not provided however. The Appellant testified that since the year 2000, live entertainment in the form of Karaoke is held on Friday and Saturday nights with the activity beginning at about 9:30 p.m. and ending at 1:00 a.m. The Appellant indicated that the karaoke activity is set-up on a raised platform in the area described as the “family dining area” on the floor plan submitted by the Appellant. The Appellant testified that no live bands or dancing is currently featured. The establishment also possesses appropriate licenses for the operation of certain coin-operated machines. Such machines include five pool tables, several arcade type games, a KENO Lottery game, lottery scratch ticket machines and an ATM machine.
- 7) Based upon the testimony of the parties and submitted photographs, the overall décor of the facility is that of a “Texas Roadhouse.” It features old license plates, antique saloon signs, saddles, stuffed fish and game trophies, metal lanterns, a large fireplace, a juke box, several televisions sets and many wooden and neon signs throughout the establishment promoting various brands of beer and liquors.
- 8) Photographs of the exterior of the establishment depict the existence of a large sign indicating the name of the establishment and includes the statements: “Best B.B.Q. Around”; “Karaoke- Fri-Sat” and “Our Fireplace Roars”.

- 9) The Appellant stated that the cost of installing a sprinkler system would pose a financial hardship for his business and that the statutory installation timeframe would be difficult to meet. The Appellant stated that he has acquired several informal estimates, which reflect an estimated cost of sprinklers to be \$39,000 for installation, with an additional cost of approximately \$10,000 for a new water line to accommodate the sprinkler system. Written documentation to support the stated estimates was not provided.
- 10) The representatives for the Shrewsbury Fire Department stated that the Order to install a sprinkler system was based upon the overall building capacity, the existence of liquor sales, a facility that is routinely over 100 persons, musical entertainment, pool tables, arcade games, lottery machines and the potential for high occupant load and impeded egress. They indicated that the establishment combines bar, restaurant and entertainment features. They testified that the establishment is not merely a restaurant since it routinely provides musical entertainment for its patrons who may or may not attend the establishment for dining purposes. Additionally they expressed concern over the fact that while some areas of the facility appear to be separated by walls and doors, there is one restroom for the facility and the establishment has free flowing operational characteristics. All these elements combined could create a dangerous situation in the event of an emergency requiring quick evacuation.
- 11) The Appellant argued that while the facility's occupancy is over 100 throughout, there is "never more than 50-60 people in the facility at one time." The Appellant stated that the facility does have a monitored fire alarm system. It also has fire extinguishers throughout and three means of egress for patrons.

F) Ultimate Findings of Fact and Conclusions of Law

- 1) The provisions of the 2nd paragraph of M.G.L. c. 148, s. 26G½, in pertinent part states: " every building or structure, or portions thereof, of public assembly with a capacity of 100 persons or more, that is designed or used for occupancy as a night club, dance hall, discotheque, bar, or for similar entertainment purposes..." , (a) which is existing or (b) for which an approved building permit was issued before December 1, 2004, shall be protected throughout with an adequate system of automatic sprinklers in accordance with the state building code". The law was effective as of November 15, 2004.
- 2) The statutory timeline for said sprinkler installation in accordance with the provisions of section 11, St. 2004, c.304, requires the submission of plans and specifications for the installation of sprinklers within 18 months of the effective date of the act (by May 15, 2006) and complete installation within 3 years of the effective date of the act (by November 15, 2007).
- 3) The legal classification of this establishment as an "A-3" assembly occupancy by the Town of Shrewsbury is a significant factor. Under the provisions of the State Building Code, 780 CMR, such a classification includes establishments that are typically designed and used as a restaurant (see 780 CMR 303.4). A building or a portion thereof used or designed "principally as a restaurant" is specifically exempt from the enhanced sprinkler requirements of c. 148, s. 26G½. However, this classification alone is not the sole factor that this Board will look at in making a determination. In a memorandum dated 1-10-05, this Board issued an interpretive guidance document relative to the provisions of this new law, M.G.L. c.148, s.26G½. This new law was a

portion of a comprehensive legislative initiative undertaken as the result of a tragic Rhode Island nightclub fire, which took place in February 2003. In said memorandum, this Board noted that the statute did not contain a definition of the words “nightclub, dance hall, discotheque, bar or similar entertainment purposes”. This Board reviewed the legislative intent and background of the statute and concluded that there were certain characteristics typical of nightclubs, dancehalls and discotheques. The board indicated that such occupancies are characterized, but not limited to, the following factors:

- a) No theatrical stage accessories other than raised platform;
- b) Low lighting levels;
- c) Entertainment by a live band or recorded music generating above-normal sound levels;
- d) Later-than-average operating hours;
- e) Tables and seating arranged or positioned so as to create ill defined aisles;
- f) A specific area designated for dancing;
- g) Service facilities primarily for alcoholic beverages with limited food service; and
- h) High occupant load density.

It was the interpretation of this board that such characteristics are typical of the “A-2 like” occupancy (which was a general reference to the A-2 use group referenced in 780 CMR, The State Building Code) and that these are the type of factors that heads of fire departments should consider in enforcing the sprinkler mandates of M.G.L. c.148, s. 26G½. It was noted that the list of characteristics was not necessarily all-inclusive. Additionally, the factors may be applied individually or in combination depending upon the unique characteristics of the building at the discretion of the head of the fire department. Some of these particular characteristics, such as entertainment by a live band, recorded music generating above normal sound levels and a specific area designated for dancing, may not necessarily exist in certain establishments that are considered a “bar”. Nevertheless, the provisions of M.G.L. clearly apply to “every building or structure, or portions thereof, of public assembly with a capacity of 100 persons or more, that is designed or used for occupancy as a...**bar**...”.

- 4) In its 1-10-05 memorandum the Board acknowledged the existence of establishments that may feature characteristics of both a restaurant and a bar or nightclub. In determining whether or not such “combination” establishments are subject to the provisions of M.G.L. c. 148 s. 26G½, this Board will look at such common sense factors such as:

- a) Does the restaurant establishment regularly and routinely serve meals on a daily basis?

- b) Does the establishment provide a bar, bar seating, bar standing and a bartender for the purposes of serving alcoholic beverages directly to alcohol consuming customers?
- c) Does the bar and bar seating area have the ability to expand into the dining area to accommodate special entertainment activities or increased capacity/density?
- d) If the establishment provides a bar and bar seating, are alcoholic beverages continuously served to customers more than one hour after full kitchen facilities have been closed?
- e) Is live or recorded music provided for dancing purposes or for a viewing audience? (does not include background dinner music)?
- f) Does the establishment provide special entertainment, including but not limited to: musical, theatrical, comedy, or sport viewing activities?
- g) Based upon the establishment's name, décor, atmosphere, does a customer expect a bar or nightclub type establishment?
- h) Is the establishment or portions thereof routinely or regularly used for private or public functions for dancing, parties, celebrations, entertainment or performance purposes?
- i) Does the establishment have an entertainment license?

5) Based upon the evidence provided at the hearing, this establishment currently serves meals on a daily basis. However, in looking at the factors as a whole, it also features substantial characteristics typical of both a bar and a nightclub, including:

- a. The existence of live entertainment in the form of Karaoke on a routine and usual basis. The Board notes that this activity takes place in the dining room area.
- b. The establishment features later than average operating hours (approximately 1:00 am)
- c. The establishment holds a full liquor license and features bar service, bar seating and a bartender during all hours of operation for the purposes of serving alcoholic beverages directly to alcohol consuming customers. Alcoholic beverages are available to customers at all times, whether or not they choose to eat a meal or not.
- d. Based upon the establishment's presentation to the general public, a customer can reasonably expect bar accommodations. The interior features a décor and atmosphere typical of a bar or roadhouse pub. The areas within the establishment consist of a variety of seating arrangements, including a fully stocked bar with bar stools, high tables with high stools in addition to several wooden tables and booths with chairs and benches. The establishment features old license plates, antique saloon signs, saddles, stuffed fish and game trophies, metal lanterns, a large fireplace, a juke box, several

televisions sets and many wooden and neon signs throughout the establishment promoting various brands of beer and liquors.

- e. The exterior of the establishment has signage which clearly advertises the existence of the live entertainment in addition to the sale of food.
 - f. The establishment is licensed and in fact features five pool tables, several arcade type games, a KENO Lottery game and a lottery scratch ticket-dispensing machine. Such features indicate that food may not be the principal attraction for certain customers.
 - g. The establishment derives a significant portion of its revenue (at least 33%) from the sale of alcoholic beverages.
- 6) Appellant's position that this establishment is "principally a restaurant" and is therefore exempt from the provisions of M.G.L., c. 148 s. 26G½ is without merit. Although the facility currently provides a wide assortment of food items typical of a restaurant, this facility, as currently operated, is clearly designed, used and marketed as an establishment that features a significant number of characteristics that are typical of a nightclub or bar, and is therefore within the scope of M.G.L. c. 148, s. 26G½, as interpreted by this Board.
- 7) The Appellant indicated that this board, in prior decisions, has determined that sprinklers were not required pursuant to s. 26G½ in certain establishments that featured combined characteristics of a restaurant, bar or entertainment venue. However, in such limited cases, the Board determined that the facility had either: (1) a clear physical and operational separation between the restaurant and bar or entertainment portions of the facility with separate, legally enforceable capacity limits stated on the Certificate of Inspection for such portions which were under 100 persons (and therefore not subject to s. 26G½) or (2) the frequency of the entertainment was not regular or routine, but temporary in nature and, therefore, specifically allowed by the law by a special permit issued by the fire department. Such factors do not currently exist in this establishment. The entertainment occurs every Friday and Saturday night. Such activity is not merely on a temporary basis, but clearly occurs on a usual, routine or regular basis. Although this establishment appears to feature physically separate rooms or areas with separate and distinct capacity limits, the testimony, photographs and description of the free-flowing nature of this establishment demonstrate the lack of operational separation that is required to clearly delineate those portions of the establishment designed or used for dining purposes and other portions used for entertainment or bar purposes.

G) Decision and Order

For the foregoing reasons, this Board unanimously **upholds** the Order of the Town of Shrewsbury Fire Department to require the installation of an adequate system of automatic sprinkler protection in the subject building in accordance with the provisions of M.G.L. c.148, s.26G½. **Sprinkler protection shall be required in all first floor areas of this building.**

Plans for the installation of an adequate sprinkler system shall be submitted to the Head of the Fire department not later than 90 days from the date that this decision was issued. Full installation shall be required in accordance with the statutory timeframe (11-15-07) or as otherwise extended by the fire department in accordance with the provisions of s. 11 of St.2004, c. 304.

H) Vote of the Board

John Mahan, Acting Chairman	In Favor
Roderick Fraser, Commissioner	In Favor
Chief Thomas Coulombe	In Favor
Alexander MacLeod	In Favor
George Duhamel	In Favor

I) Right of Appeal

You are hereby advised that you have the right, pursuant to section 14 of chapter 30A of the General Laws, to appeal this decision, in whole or in part, within thirty (30) days from the date of receipt of this order.

SO ORDERED,



John Mahan, Acting Chairman

Dated: June 5, 2007

**A COPY OF THIS DECISION AND ORDER WAS FORWARDED BY CERTIFIED MAIL,
POSTAGE PREPAID TO:**

Richard J. Luzzo, Sr.
c/o Williker's Tex Mex BBQ
896 Hartford Turnpike
Shrewsbury, Massachusetts 01545

Chief Gerald F. LaFlamme
Shrewsbury Fire Department
11 Church Road
Shrewsbury, Massachusetts 01545